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No. 77-785

In the Supreme Court of the United States

OCTOBER TERM, 1977

CONSUMERS UNION OF UNITED STATES, INC., PETITIONER

v.

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.,
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Petitioner brought this action in the United States District Court for the District of Columbia, seeking injunctive and declaratory relief against the administration of the program imposing quotas on the importation of textiles and textile products into the United States, pursuant to Section 204 of the Agricultural Act of 1956, 70 Stat. 200, as amended, 7 U.S.C. 1854. Petitioner sought to require the Committee for the Im-

plementation of Textile Agreements (CITA)[1] to make reasoned determinations of the need to impose restraints on such imports and to adopt certain procedural conditions for imposing restraints, as allegedly required by Section 204 of the Agricultural Act and by Sections 3 and 4 of the Administrative Procedure Act, as amended, 5 U.S.C. 552–553.

Respondents contended that the district court lacked jurisdiction of this matter because exclusive jurisdiction was vested in the customs court, that petitioner lacked standing, and that the suit presented a non-justiciable political question.

The district court granted summary judgment against petitioner (Pet. App. 1a–15a). The court held that it had jurisdiction to hear the case and that petitioner had standing to sue, but it also held that CITA's statutory authority under Section 204 for imposing quotas on textile imports falls within the foreign affairs exception to the judicial review provisions of the Administrative Procedure Act, and that the Executive Branch is not required to determine the need for import restrictions before imposing such restrictions.

The court of appeals vacated the judgment on jurisdictional grounds and ordered the action dismissed

[1] CITA is an interdepartmental group of officials within the Executive Branch, established by Executive Order 11651, 37 Fed. Reg. 4699, and is responsible for supervising the implementation of all textile trade agreements between this and other countries. The Committee consists of representatives of the Departments of State, Treasury, Commerce, and Labor; the President's Special Representative for Trade Negotiations, or his designee, is a non-voting member.

(Pet. App. 16a–21a; 561 F. 2d 872). The court held that the customs court has exclusive jurisdiction to entertain challenges to trade agreements, and that, under 28 U.S.C. 1340, the district court therefore had no jurisdiction. The decision of the court of appeals is correct and presents no issue warranting review by this Court.

We agree with petitioner that, under 28 U.S.C. 1582, "Customs Court jurisdiction is invoked only when an individual protests a specific administrative ruling made at a United States port of entry, and when that protest has been denied." *Sneaker Circus, Inc.* v. *Carter*, 566 F. 2d 396, 399 (C.A. 2). The keystone of petitioner's argument here is that "under the challenged restraint programs, merchandise in excess of the quotas never comes to the United States" because "that quota is allocated internally and enforced by the exporting country" (Pet. 18–19). Therefore, petitioner argues, there can never be a protest at the port of entry, the customs court does not have jurisdiction, and, because the district court must have jurisdiction if the customs court does not (see 28 U.S.C. 1340), its suit should have been adjudicated.

Petitioner's bald assertion that merchandise "never comes to the United States" appears for the first time in its petition for certiorari. It was not alleged in petitioner's complaint or at any other point before the district court, nor was it raised in the court of appeals. It certainly does not follow from Section 204 of the Agricultural Act of 1956 or from any program established or administered by CITA. If petitioner had properly raised this factual assertion, the United

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States would have denied it and introduced evidence that, under agreements of this type, goods often are shipped to the United States in excess of agreed-on quantities. A customs officer's decision to exclude these shipments is subject to protest, allowing adjudication in the customs court.

The source of petitioner's statement is evidently the decision of the Second Circuit in *Sneaker Circus*. That court, citing specific provisions of Korean law, held that restraints on imports of Korean and Chinese footwear under the Trade Act of 1974 presented "no occasion for protest under Section 514" because violations of that program subjected exporters to "heavy civil and criminal sanctions" in the countries where the goods would be manufactured, making excess exports unlikely (566 F. 2d at 399). But that case is plainly distinguishable from this. It involved exports, from two specific countries, of different commodities under a different program of restraints authorized by a different Act and administered by a different agency of the United States. Petitioner's substantive complaint is, in its own words, that "CITA may not impose [the present] restrictions [on textile imports] unless it first makes determination of actual or potential domestic market disruption, in accordance with the implicit standards of Section 204 [of the Agricultural Act of 1956] and the basic procedural requirements of the Administrative Procedure Act" (Pet. 10). *Sneaker Circus* did not involve CITA, textiles, the Agricultural Act, or the Administrative Procedure Act, and therefore the Second Circuit's statement that excessive footwear exports from China or Korea would never reach this country to trigger customs court jurisdiction, whether or not correct, has no application here. Petitioner simply cannot transplant that statement of facts to this case, and it certainly cannot do so for the first time at this late stage of the litigation.

Without this factual shoring, petitioner's case collapses. Its assertion (Pet. 20) that the customs court does not have equitable jurisdiction and thus cannot render petitioner the relief it seeks is a *non sequitur*. Although the customs court lacks equity jurisdiction, it may entertain petitioner's properly presented challenge to the validity of CITA's action[2] and, if that challenge is meritorious, may rule that the agreements at issue were not lawfully promulgated and deny enforcement of them. So long as adequate relief is available, the fact that it is not the exact form of relief sought is immaterial. *J. C. Penney Co.* v. *United States Treasury Department*, 439 F. 2d 63, 68 (C.A. 2), certiorari denied, 404 U.S. 869.

Petitioner's argument that the decision here conflicts with *Sneaker Circus* (Pet. 23–24) thus is incorrect. Furthermore, the court of appeals here agreed that, in cases where "[t]here could * * * never have been a decision by a Customs official upholding the

[2] That challenge presumably could be presented when petitioner files suit in the customs court under 28 U.S.C. 1582(a) (if it has standing to do so) after an "appropriate customs officer" has denied its protest of an administrative decision excluding from this country textiles shipped in excess of the quotas embodied in the agreement.

restraint and opening up the protest procedure which affords access to the Customs Court," jurisdiction would lie in the district court (Pet. App. 20a). See *Consumers Union* v. *Kissinger*, 506 F. 2d 136 (C.A. D.C.). This case and *Sneaker Circus* thus recognize the same general rule—a rule that, in order to maintain a uniformity of decisions that may be essential to the foreign relations of the United States, the customs court ordinarily has exclusive jurisdiction of challenges to international trade agreements. This case and *Sneaker Circus* recognize the same exception to that rule—the district courts have jurisdiction when it is *impossible* for the customs court to acquire jurisdiction. The courts simply applied that exception differently on different records. The difference in result does not reflect a difference in legal principle, and there is no conflict requiring resolution.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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